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IN THE

Supreme Court of the United States.

No. . October Term, 1941.

ART METAL CONSTRUCTION COMPANY, FOR ITS OWN USE AND FOR THE USE OF McCLOSKEY & CO., INC.,
Petitioner, and
Appellants Below,

v.

LEHIGH STRUCTURAL STEEL COMPANY,
Respondent, and
Appellee Below.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

To the Honorable Harlan F. Stone, Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

Your petitioner respectfully shows:

I.

SUMMARY STATEMENT OF THE MATTER INVOLVED.

This is a civil action brought in the District Court of the United States for the Eastern District of Pennsylvania, by petitioner for its own use and the use of another against the respondent for the recovery of an unpaid balance for labor and materials furnished by petitioner under a contract with respondent's assignor. A first appeal was made

to the Circuit Court of Appeals for the Third Circuit from a judgment of said District Court on the pleadings, statement of claim and amended answer thereto, judging petitioner had averred no cause of action, which judgment was reversed by the Third Circuit, having been heard as No. 7492, October Term, 1940, the decision thereon being reported in 116 Federal 2nd 57. On May 4, 1931, McCloskey & Co. Inc., contracted with the County of Berks to erect and construct a Court House at Reading, Pennsylvania, and filed, as required by law, the usual bond conditioned for the payment of all persons supplying labor and material in the prosecution of the work. (R. 84.) The "general conditions" of said contract provided they applied to all contracts and subcontracts required for the work. (R. 84.) Article XV of the contract required McCloskey & Co. to provide and pay for all material, labor and facilities necessary for the completion of the work. (R. 85.) By Article XL, McCloskey agreed to bind and the subcontractor agreed to be bound to McCloskey by the terms of the agreement, the general conditions, drawings and specifications, and to assume McCloskey's obligations and responsibilities to the County, on the work of such subcontractor. (R. 85.) On May 8, 1931, McCloskey entered into a subcontract with the Bauman Iron Works whereby Bauman agreed to furnish and erect certain materials required for the work, including structural steel and architectural bronze and wrought iron, for a price of $246,000. This subcontract, by its express terms, incorporated the provisions and general conditions of McCloskey's principal contract with the County of Berks. (R. 85.) By exchange of letters, May 11, and 16, 1931, Bauman re-subcontracted to respondent the structural steel work for $179,500.00. (R. 85, 86.) On May 27, 1931, Bau-

man re-subcontracted to petitioner the Architectural Bronze and Wrought Iron, with certain exceptions, for $29,000.00, subsequently, by changes, reduced to $28,780.70, which subcontract by express terms, incorporated the provisions and conditions of McCloskey's principal contract with the County of Berks. (R. 86.) On July 2, 1931, months before petitioner had begun to furnish any materials required by it, Bauman, by an absolute assignment, executed by Robert L. Kift, its President, who was also at the time Treasurer and General Manager of respondent, in Kift's office at respondent's plant, and without the knowledge or consent of either petitioner or McCloskey, assigned, transferred and conveyed to respondent, the McCloskey-Bauman subcontract of May 8, 1931, in its entirety. This transaction, respondent admits, speaks for itself. (R. 85 and 88.) The consideration recited for the assignment was the performance by respondent of the work required of Bauman by the terms and conditions of the McCloskey-Bauman subcontract, named, identified and made part of the assignment, including the furnishing of the Architectural Bronze and Wrought Iron for the work. (R. 88.) By November, 1931, all structural steel work had been performed (R. 100). On November 24, 1931, petitioner began its required work, which was completed satisfactorily by December 3, 1932 (R. 86), having received prior to that date, $11,005.00 on its work, leaving an unpaid balance of $17,775.70 (R. 87). On January 28, 1933, Bauman assigned, in writing, a balance of $5362.03 payable under the McCloskey-Bauman subcontract to petitioner as collateral security for the $17,775.70 (106-107) which was paid to petitioner by McCloskey on November 22, 1933, reducing the unpaid balance due petitioner to $12,413.67. (R. 87.) In 1933,

Bauman failed (R. 10 and 40), incident to which proceedings, petitioner received $2656.52, reducing its unpaid balance to $9757.15. (R. 87.) McCloskey paid Bauman its contract price, by checks aggregating $235,984.00, of which, checks totaling $208,528.49 were endorsed and delivered by Bauman directly to respondent which collected same. In addition, out of the November 19, 1931, check, Bauman paid respondent $18,136.16, or a total of $226,664.65. (R. 91-92.) Of such sum $179,234.95 had been delivered to respondent by Bauman by November 19, 1931, and $47,429.70 was transmitted thereafter (R. 91) by endorsement over of McCloskey's checks. (R. 92.)

Petitioner filed suit against respondent to recover the $9757.15 due it, by reason of respondent's assumption under the absolute assignment of July 2, 1931 (R. 88), of Bauman's obligation to pay, and by securing and maintaining control of the McCloskey-Bauman subcontract and the benefits accruing thereunder, after the assignment. After refusal of petitioner's motion for judgment on the pleadings, judgment was entered for defendant (R. 61), which decision was, after reargument, affirmed (R. 65). An appeal was taken to the Third Circuit as of No. 7492, October Term, 1940, which Court reversed the District Court, on the basis that respondent, as assignee, assumed the obligation to pay petitioner, the cause being remanded for further proceedings (R. 66 to 69). Reported 116 Fed. 2nd 57 at 58 and 59. Thereafter petitioner's motion for summary judgment (R. 77) was denied with opinion filed (R. 80-81). Thereafter a trial was held by the District Court without a jury (R. 82 to 119), and after requests for findings of fact and conclusions of law (R. 120-130), that court allowed oral testimony, objected to, of an alleged secret understanding of the assignor and assignee, the effect of which

was to nullify and destroy the unqualified obligation of the assignment of July 2, 1931, (R. 131 and 133), entered judgment for respondent (R. 136), petitioner promptly appealing a second time to the Third Circuit as of No. 7833 (R. 137), which court by opinion January 9, 1942, affirmed the District Court (R. 142 to 146). A petition for rehearing was filed January 22, 1942 (R. 147 to 156) which, after answer (R. 157-160) was denied February 10, 1942 (R. 160).

II.

Reasons Relied on for the Allowance of the Writ.

1. The decision of said Circuit Court of Appeals denying petitioner's right to recover from respondent, by holding that the absolute and unqualified obligations assumed by the respondent in becoming assignee of the McCloskey-Bauman subcontract could be destroyed by inadequate oral testimony of a secret understanding, prior to the assignment, between the assignor and assignee, is a decision of an important question of local law in a way probably in conflict with the applicable local decisions.

2. The decision of said Circuit Court of Appeals failed to apply the local law of Pennsylvania as expounded by the Supreme Court of Pennsylvania in more recent cases than the authorities relied upon in its opinion, and while a correct expression of local law where the suit is between two parties to a written agreement who both admit that the writing does not embody the entire contract, or where fraud, accident, or mistake is averred and proved, such decisions are inapplicable and reliance thereon by the said Circuit Court of Appeals is erroneous, in a case where there is no such admission by the parties to the suit, no averment nor proof of fraud, accident or mistake, and, as

in the present case, the suit is between a third party and only one of the original parties to the agreement.

3. The decision of said Circuit Court of Appeals that the respondent, as assignee, did not assume the duties of the assignor under the contract assigned, including the obligation to pay petitioner, was contrary to its ruling in the present case on the first appeal, reported in 116 Federal 2nd 57 at 59.

4. The decision of the said Circuit Court of Appeals that the action of the trial court was proper in allowing oral testimony to vary the terms and nature of the absolute assignment is contrary to the law of Pennsylvania as expounded by the Supreme Court of that state, which latter court requires such evidence to be clear, precise, and indubitable.

5. The opinion of the said Circuit Court of Appeals is clearly in error where it states (R. 145) that the McCloskey-Bauman subcontract was itself assigned to petitioner, when in fact, the said assignment was only of moneys remaining due on said contract and then as collateral security (R. 106-107).

III.

Transcript of Record.

Your petitioner presents to this court under Stipulation of Counsel (R. 161), and files herewith as an exhibit hereto, a duly certified transcript of the entire record in the case, as the same appears in the United States Circuit Court of Appeals for the Third Circuit.

Wherefore, your petitioner prays that a writ of certiorari issue under the seal of this court, directed to the

Circuit Court of Appeals for the Third Circuit, commanding said court to certify and send to this court a full and complete transcript of the record, and of the proceedings of said Circuit Court had in the case numbered and entitled on its docket, No. 7833, Art Metal Construction Company, for its own use and for the use of McCloskey & Company, Inc., Appellants, vs. Lehigh Structural Steel Company, Appellee, to the end that this cause may be reviewed and determined by this court as provided for by the statutes of the United States; and that the judgment herein of said Circuit Court be reversed by the court; and for such further relief as to this court may seem proper.

Dated May 4, 1942.

ART METAL CONSTRUCTION COMPANY,

By EDWARD J. MINGEY,
of Counsel for Petitioner.
EDWARD PAUL SMITH,
Counsel for Petitioner.